



Notification, non-performance, remedies and defenses: a complex relationship

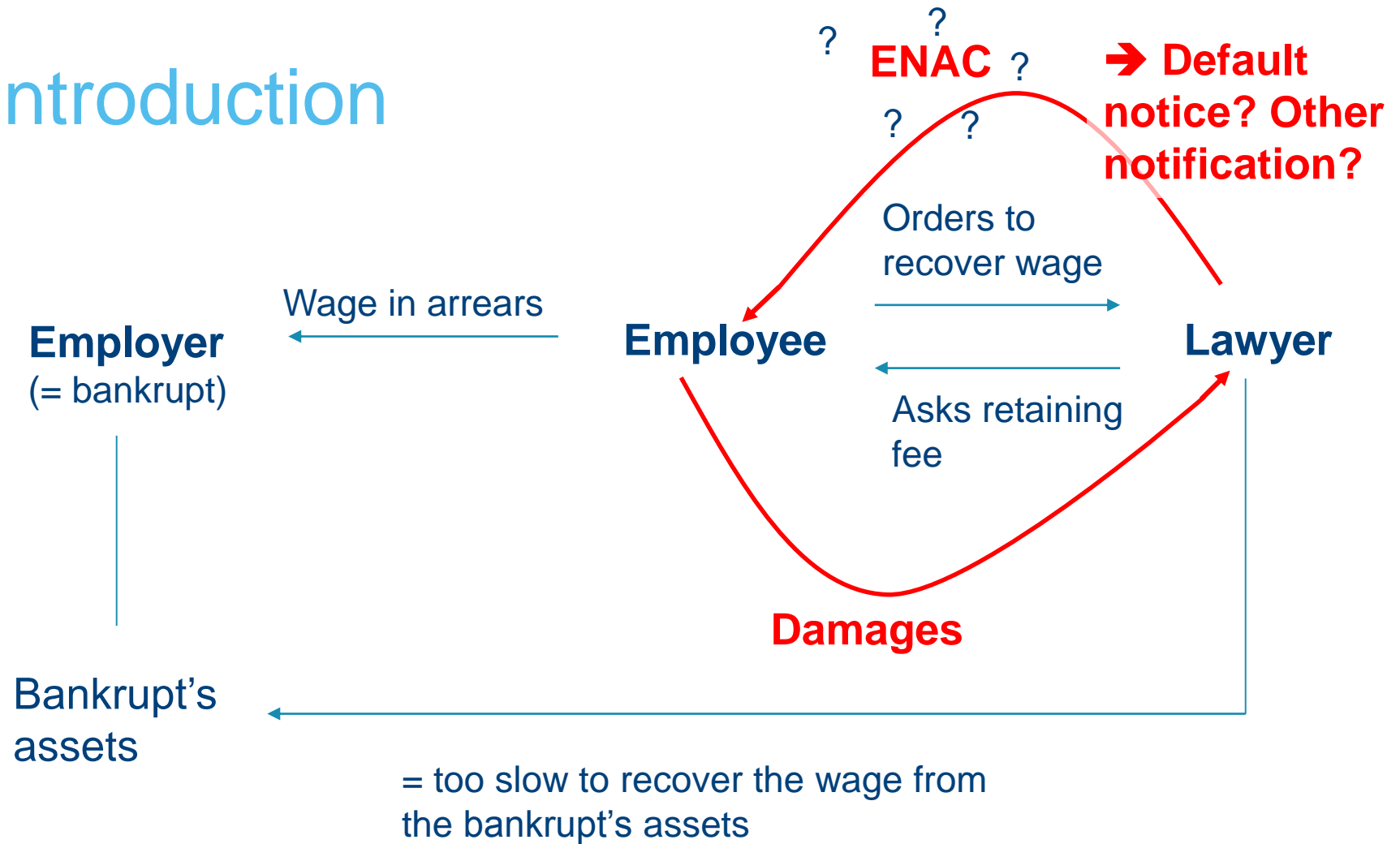
*“Obviously, a man’s judgment cannot be better than the information on which he has based it” * Sulzberger*

Ius Commune Conference, 28/11/2014
Edinburgh
Sanne Jansen

Introduction



Introduction



Problems

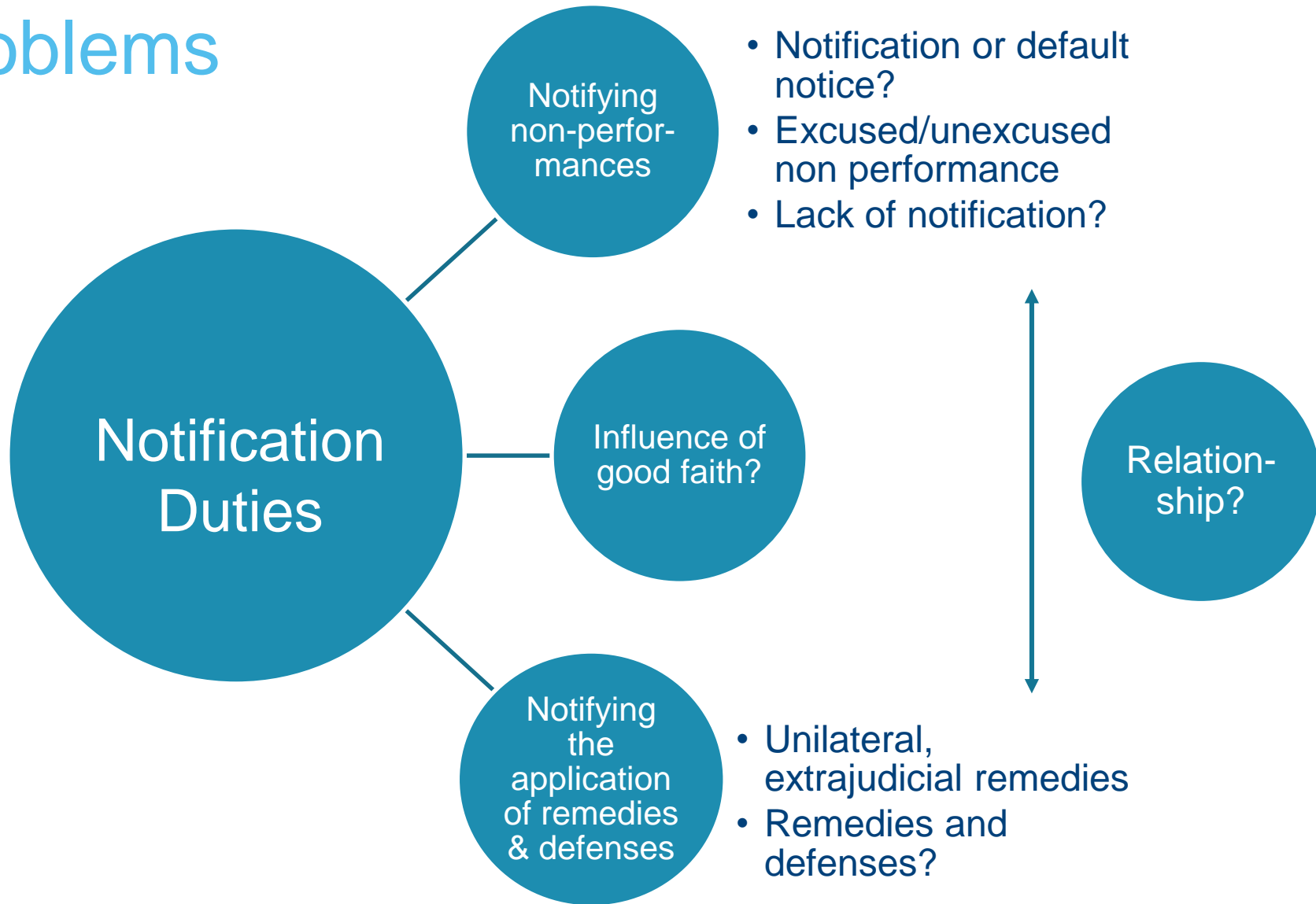


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Selection of some controversial issues

I. Notification of non-performances

A. Default notice (and enac)

B. Default notice ⇔ other notification duties

C. Notification under European contract law

II. Notification of the application of remedies / defenses

A. Unilateral remedies

B. Defenses?

III. Interplay

I. Notification of non-performances

A. Default notice (and enac)

General principle

- General principle for contractual sanctions
- Exceptions, **enac** (intro case)?

Form & Content

- Form: lenient rules
- Content: compelling / **specific sanction?** / **additional period** to perform?

Effects

- Enabling to enforce contractual rights
- Moratory interests are due
- Transfer of risk

I. Notification of non-performances

B. Default notice ⇔ other notification duties

E.g. **Sales law**

- Examination- and notification duty
- Acceptance: renunciation to invoke visible defects
- Protest within a short period of time
- Sanction: loss of sanctions for non-performance
- Combination with default notice possible



E.g. **Tenancy law**

- E.g. artt. 1726 CC (legal actions from third parties); duty to repair and defects → notification
- Except: landlord knows/ought to know defects
- Sanction: to be held liable, risk to lose sanctions?

I. Notification of non-performances

B. Default notice ↔ other notification duties

Default notice

- Sanctions can be applied
- Interest / transfer of risk
- To warn about a non-performance
- (Additional period to perform)

Other notification duties

- To warn about a non-performance
- Second chance, possibility to cure
- Trust

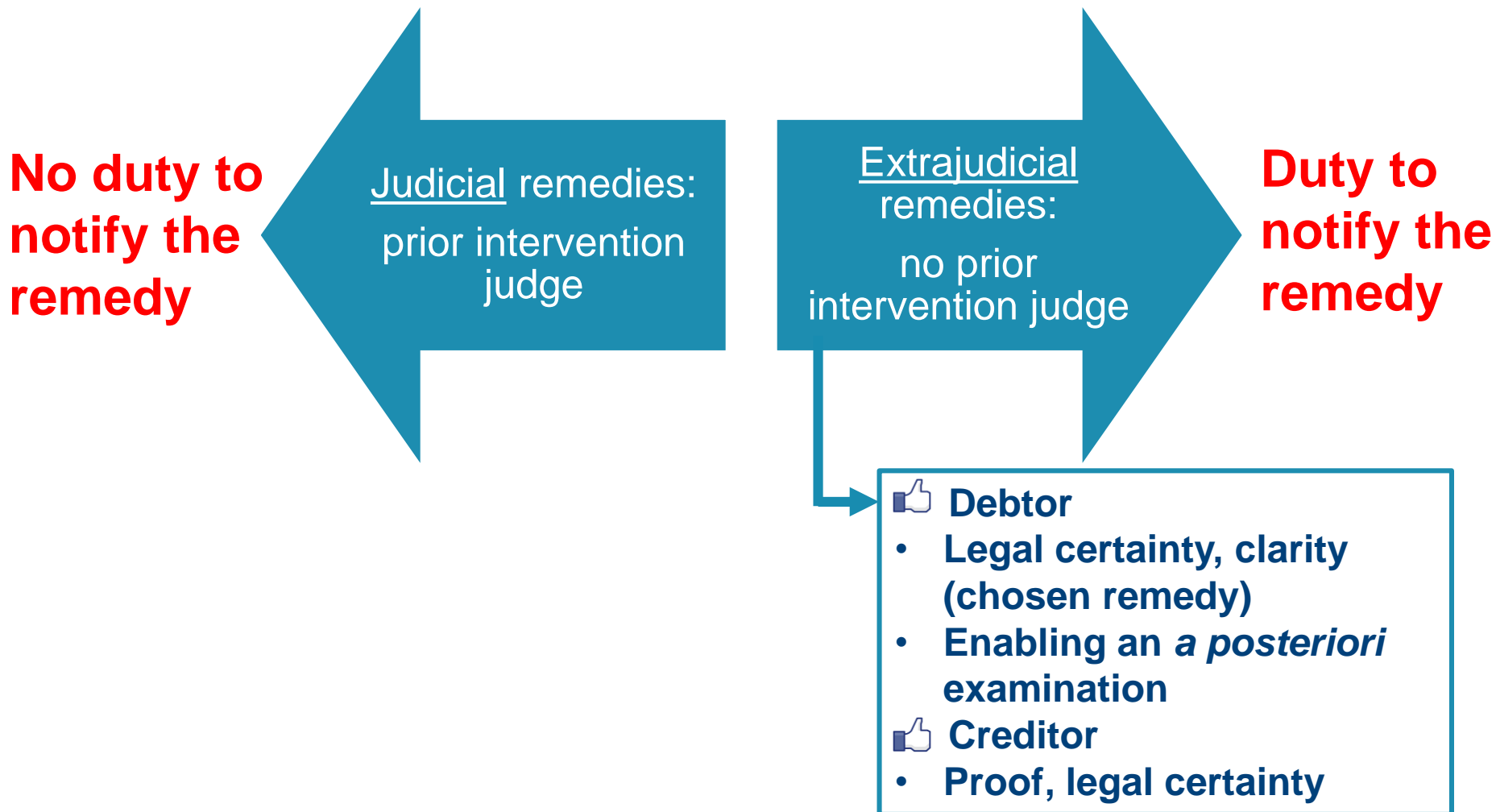
I. Notification of non-performances

C. Notification under European contract law

	PECL	DCFR	CESL	Consumer Sales
Notification (un) excused non-performance	/ (good faith and fair dealing)	Yes, except for consumers	Yes, except for consumers	Not explicitly, but possibility for MS to introduce a notification period
Time-limit	/	Reasonable time	Reasonable time	(not shorter than two months)
Sanction	/	To lose the right to rely on the lack of conformity	Idem, but amendment 26/2/2014, in case of a reasonable excuse	/

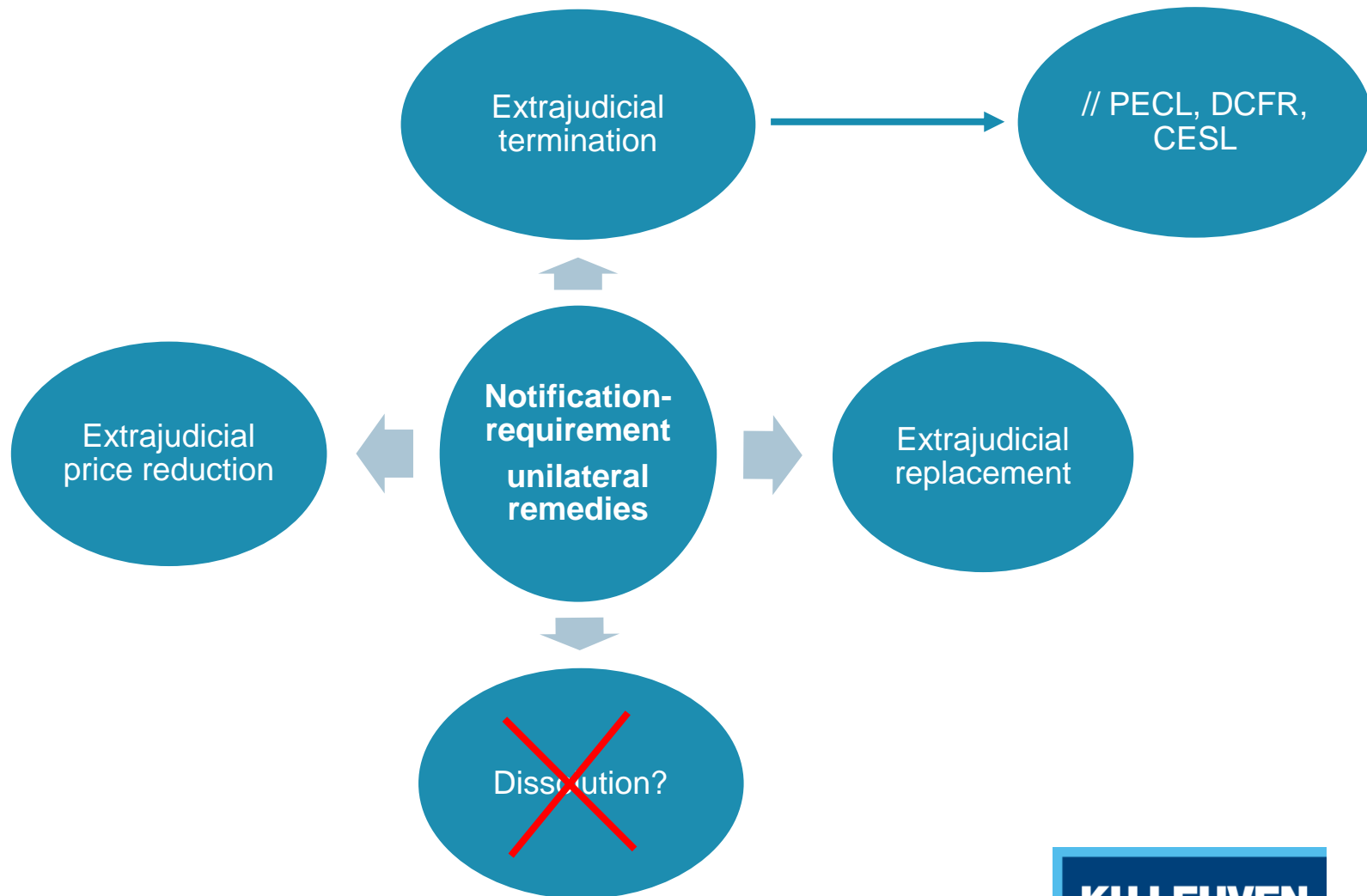
II. Notification of the application of remedies/defenses

A. Unilateral remedies



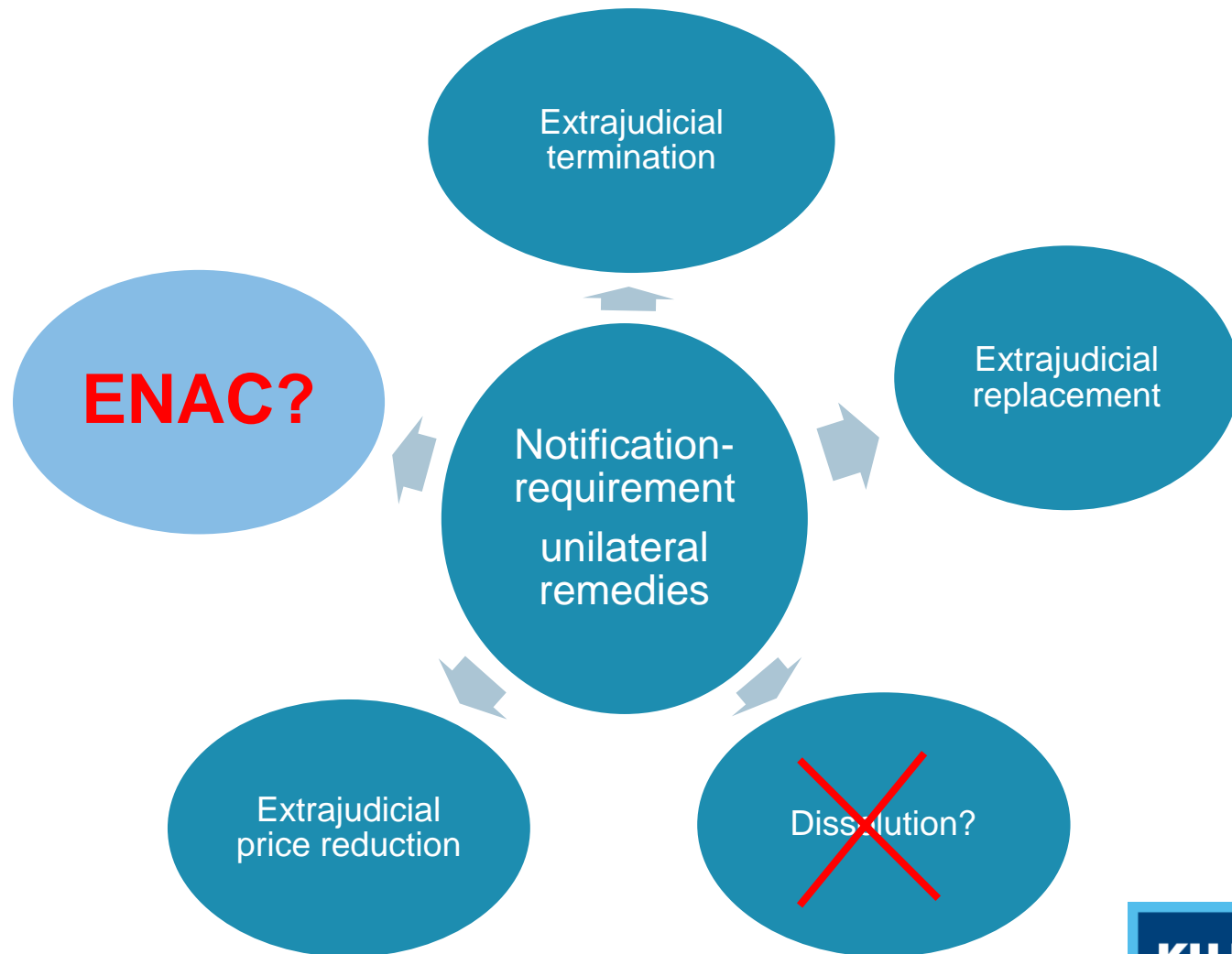
II. Notification of the application of remedies/defenses

A. Unilateral remedies

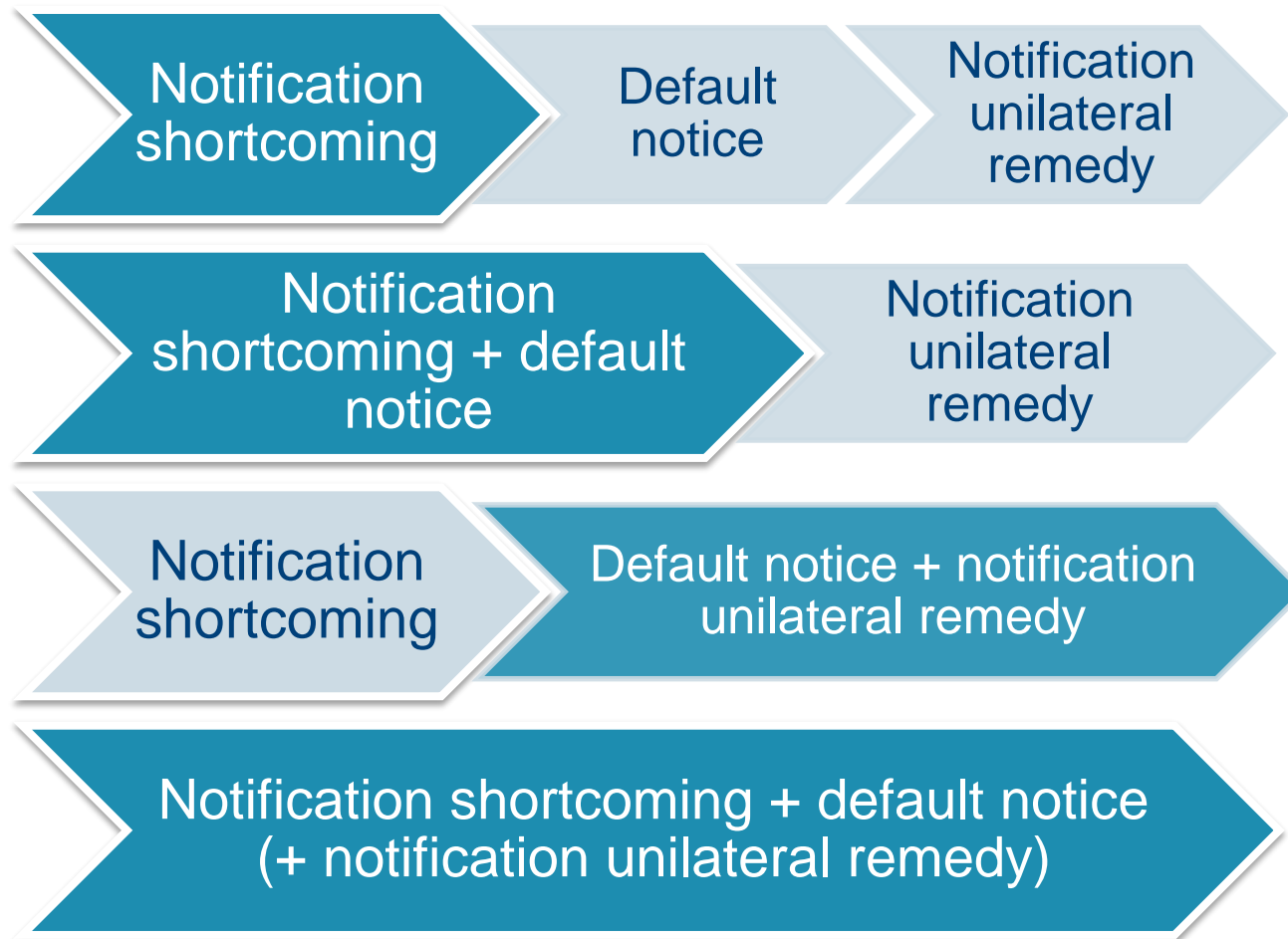


II. Notification of the application of remedies/defenses

B. Unilateral remedies & defenses



III. Interplay (instrumentum)



Concluding remarks

- Notification and force majeure
- Formality and unilateral remedies
- Unilateral remedies and an additional period of time to perform?
- Difference between remedies and defenses?
- Role of good faith?

